

DANNY R. GILLESPIE
Claimant

MARTIN ROOFING CO., INC.
Respondent

BUILDERS' ASSOC. SELF-INS. FUND
Insurance Carrier

ORDER

ISSUES

The respondent requests review of: (1) whether the claimant met with personal injury arising out of and in the course of employment; and, (2) whether the claimant gave timely notice pursuant to K.S.A. 44-520.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a lead man foreman of a crew that repaired roofs. Claimant alleged injury to his back beginning July 20, 2004, through his last day worked on August 18, 2004. On July 20, 2004, claimant was pulling up some walkway and noticed that his back started hurting. Claimant told his supervisor, John Britt, that his back was hurting from pulling up the walkway.

The following days as claimant continued to work he noticed that shoveling gravel caused his back to hurt. Claimant testified that he told Chris and Tammy, the secretary, that he was going to his chiropractor because his back was hurting. Claimant testified that he later had a conversation with Tammy that he had hurt his back at work and inquired about worker compensation but was told he could not turn it in because he had already gone to his doctor. Claimant testified that the following conversation occurred while he was still working for respondent.

Q. You told Tammy Tyler, the secretary who is in charge of filing workers' compensation claims at Martin Roofing, you want to see a different doctor because the chiropractor wasn't cutting it?

A. Yes, sir.

Q. And you told her specifically that your back was bothering you since the work in Coffeyville and did you tell her that the shoveling was making it worse?

A. I told her whenever I was shoveling gravel and lifting anything heavy it was bothering me.

Q. And she told you since you turned [it] in to your own insurance you couldn't file a claim?

A. Right.¹

Claimant sought treatment with his chiropractor on July 29, 2004. Claimant testified that he did not initially tell his chiropractor that he had injured his back pulling up the walkway.

Because his back pain did not improve and instead continued to worsen the claimant called respondent and indicated that because of back pain he could not work on

¹ P.H. Trans. at 22-23.

August 19, 2004. Claimant sought treatment from his doctor, Dennis Knight, on August 20, 2004. A CT myelogram revealed claimant had a large disk herniation at L2-3. Dr. Knight then referred claimant to Dr. Hsu. Claimant explained his condition to Dr. Hsu in the following manner:

Q. Dr. Hsu's record of August 27 states, quote, this began two to three weeks ago with no causative injury, end of quote. Do you know why he would put that in there in his records?

A. He had said something to me when I was in there, "How did you hurt your back," and I said, "I don't know." And that was about it because I told him I didn't know for sure how it started. And at the time I - - you know, it was later on I told him that I thought it was caused by the - - you know, when I was working shoveling gravel and stuff.²

When claimant discovered that he might possibly need an operation he contacted Jeff DeMott and inquired if he could make a workers compensation claim because his injury had happened on the job. Claimant testified he was told it was too late because he had already gone to his own doctors.

John Britt, respondent's general superintendent, testified he was claimant's supervisor. Mr. Britt denied claimant had told him he had hurt his back on July 20, 2004. Mr. Britt further testified claimant never stated he had hurt his back at work nor had claimant ever requested that he be sent to a doctor for treatment. Finally, he testified claimant had never asked about filing a workers compensation claim. Lastly, Mr. Britt testified he never asked claimant why his back was hurting or what had caused his injury that required surgery.

Jeff DeMott, respondent's president, testified that on September 16, 2004, he had a conversation with claimant. Claimant inquired about light-duty work and was told there was nothing available. Claimant then asked if he could turn his injury in to workers compensation. Mr. DeMott testified he told claimant that it required an on-the-job accident and claimant had never reported having an injury or accident. Mr. DeMott agreed that he knew claimant was missing some work because he had hurt his back. Mr. DeMott further testified he had asked Mr. Britt why claimant was missing work and had been told that his back was hurting. Mr. DeMott testified he had asked Mr. Britt if claimant had hurt his back at work but Mr. Britt had responded he had asked claimant but claimant responded that he did not know how he had hurt his back.

Chris Foley, respondent's vice president, testified claimant had never told him that he had hurt his back at work. Mr. Foley further testified claimant had never requested

² Gillespie Depo. at 25

medical treatment nor that respondent pay his medical bills. But Mr. Foley was aware that claimant's back was bothering him in July and August 2004.

Tammy Tyler, respondent's office manager, testified she noticed claimant had not been working and was told claimant had been calling in because his back was hurting. Mr. Pherigo had also laughingly told her that he heard claimant was going to collect workers compensation benefits. On September 16, claimant had called and inquired if he could draw workers compensation benefits. Ms. Tyler testified she told claimant that since "it didn't occur on the job that he couldn't file it" whereupon she transferred the call to Jeff DeMott. Ms. Tyler testified claimant never told her he had suffered a work-related injury to his back.

Howard Pherigo testified he works for respondent as a foreman for a roofing crew. Mr. Pherigo testified he knew claimant had hurt his back and was going to have surgery and further expressed a wish that he could draw workers compensation benefits. Mr. Pherigo could not recall his conversation with Ms. Tyler about claimant filing a workers compensation claim.

The ALJ concluded claimant suffered accidental injury arising out of and in the course of his employment and provided timely notice. The ALJ specifically determined the claimant was a credible witness:

14. The Court further finds that Claimant gave proper notice to Respondent about his work related injury. The Court finds Claimant to be a credible witnesses [sic] and is persuaded by Claimant's sworn testimony that he told John Britt, his supervisor, that he hurt his back on the Coffeyville job and that his symptoms of pain worsened as he continued to work for respondent. Four of respondent witnesses admit that they were aware of Claimant's continual complaints of back pain between July 20, 2004 and August 18, 2004. Respondent was also aware of the hard physical labor required to shovel gravel and tear off roofing material.³

As noted above, there is definitely conflicting testimony in this case. The claimant testified he told his direct supervisor as well as other supervisors that he had suffered a work-related injury to his back. The respondent's witnesses denied that claimant gave notice that he had suffered a work-related injury. Their testimony regarding notice of a work-related injury is in direct conflict with each other. Thus, credibility is at issue. The ALJ had the opportunity to assess the claimant's demeanor. In this case, the ALJ believed the claimant and made a specific finding the claimant's testimony was credible. Under this circumstance, where conflicting testimony exists, the Board finds some deference should be given to the ALJ's evaluation of the claimant's credibility.

³ Order (Dec. 13, 2004) at 3.

Moreover, there were inconsistencies in the testimony of John Britt. Mr. Britt denied claimant told him that he hurt his back at work and further testified that he had never asked claimant how he had hurt his back. However, both Tammy Tyler and Jeff DeMott indicated that when they questioned Mr. Britt he indicated he had asked claimant several times how he had hurt his back. Therefore, the Board concludes the ALJ's preliminary hearing Order should be affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 13 2004, is affirmed.

IT IS SO ORDERED.

Dated this 28th day of February 2005.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ K.S.A. 44-534a(a)(2).